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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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T. H. BELL, SECRETARY OF EDUCATION,
*Petitioner*,

v.

STATE OF NEW JERSEY, et al.

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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### INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 19 years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The Lawyers' Committee has had a long-standing interest in Title I of the Elementary and Secondary Education Act because of the statutory emphasis upon meeting the needs of poor and disadvantaged children. In the early 1970's the Committee began to monitor federal administration of the Title I program, in order to determine whether states and local school districts were using

their grants to operate projects which carried out this basic purpose. These activities greatly intensified in 1975 with the creation of the Committee's Federal Education Project. This Project has become a major informational resource for parents of Title I participants and Title I staff in local educational agencies, and it has provided legal representation to parents of Title I students in litigation and administrative complaint proceedings. In 1976, pursuant to a contract with the National Institute of Education, the Lawyers' Committee established a separately staffed unit, the Legal Standards Project, to conduct research on the legal framework of Title I. This project subsequently provided extensive recommendations for legislative changes, many of which were incorporated in the Education Amendments of 1978, P.L. 95-561. The Congress' reliance upon the work of the Legal Standards Project is acknowledged in the legislative history of the 1978 amendments.

Throughout this long involvement with Title I, the Lawyers' Committee has been concerned with vigorous enforcement of the programmatic and fiscal restrictions embodied in the federal statute and regulations. Compliance with these requirements is essential, in our judgment, to insuring the educational effectiveness of compensatory instruction funded by the federal government; and experience demonstrates that full compliance depends in significant part upon the expectation that disregard of statutory conditions upon the expenditure of funds will be followed by audit and meaningful sanctions. Thus, the Committee is alarmed by the holding below that New Jersey and Pennsylvania need not reimburse the federal government for grant funds admittedly misexpended in prior years' Title I programs. We file this brief *amicus curiae** in order to share these concerns with the Court

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* Letters of consent by all parties to the submission of this brief are being filed with the Clerk in accordance with Rule 36.1 of the Rules of this Court.

and to give the Court the benefit of our long and close association with the statute in question—experience which leads us to the conclusion that the ruling below is contrary to the language of the statute and to the consistent intent of Congress since its initial enactment in 1965.

## STATEMENT

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act (ESEA)[1] to provide federal funds to local school districts for programs meeting the needs of educationally deprived children in areas with high concentrations of low-income families. In order to ensure that Title I funds reach their intended beneficiaries, the statute includes specific provisions with which state education agencies (SEAs) and local education agencies (LEAs) must comply. Title I funds may not be used to replace local school funds, but must be used to provide supplemental services above those normally provided. State and federal audits are authorized to assess local compliance with statutory criteria.

New Jersey and Pennsylvania ("States") have participated in the Title I program since its inception and were aware of the various statutory and regulatory requirements for participation. In the early 1970's audits conducted by the United States Department of Health, Education and Welfare Audit Agency (HEWAA) determined that both States had misapplied substantial amounts of federal Title I funds during prior years.

Although these cases did not go through the appeals process simultaneously, each involved the same procedural steps. Final audit reports were issued in April (Pennsylvania) and June (New Jersey) of 1975. The Deputy Commissioner for Elementary and Secondary Education in the Office of Education, in May (Pennsyl-

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[1] Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29.

vania) and June (New Jersey) of 1976, issued final determination letters sustaining the findings and ordering both States to refund the amounts determined to have been misspent. The States then filed applications for review with the Title I Audit Hearing Board.[2] After hearings, the successor Education Appeal Board concluded that both States should repay the funds found by the HEWAA to have been misspent, although the original amounts were reduced pursuant to the five-year statute of limitations on repayment of misspent funds. The Board's decisions were subject to a comment period during which the Secretary declined to review them. Accordingly, the Board's decisions became the final decisions of the Department.

New Jersey and Pennsylvania then filed petitions for review with the United States Court of Appeals for the Third Circuit. Although the petitions were never formally consolidated, the Third Circuit issued a single opinion reversing the orders of the Department of Education. The court of appeals held that even if the funds were misspent, the government did not have the statutory authority, before 1978, to require repayment through administrative proceedings.[3] The Court expressed con-

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[2] The Title I Audit Hearing Board was established by the Department of Education in 1972 to provide state education agencies with an impartial tribunal to hear audit appeals. 37 Fed. Reg. 23,002 (1972). On June 29, 1979, the Education Appeal Board (EAB), created by Pub. L. No. 95-561, 92 Stat. 2143, 2347 (1978) (codified at 20 U.S.C.S. § 1234) assumed jurisdiction of all cases then pending before the Title I Audit Hearing Board. 44 Fed. Reg. 43,807 (1979).

[3] The government also argued that it had a common law right, independent of statutory authority, to recover money distributed contrary to law or under a mistake of fact. The court did not decide this issue. The court found that this governmental right of recovery is administratively exercised by set-offs and that the advance funding method of distributing Title I funds does not lend itself to this means of enforcement. Thus, the court held, even if the government retains its common law right, it may enforce such right only by maintaining a civil action in a court of competent jurisdiction.

cern that the intended beneficiaries of Title I monies would lose valuable Title I services if New Jersey and Pennsylvania were now forced to repay misspent funds.

## SUMMARY OF ARGUMENT

### I.

The federal government, under Title I, gave the states money for specific, defined purposes, and for no other. When the states used such funds for their own, unauthorized, purposes, they were in the same position as a trustee who converts trust funds to his own use. Under such circumstances, there should be no serious question as to the duty of the states to make restitution for misused funds. That duty is inherent in the terms under which the funds were received and need not be spelled out in the statute.

Congress showed its understanding that misspent funds were subject to repayment by the states when in 1974 it enacted a five-year statute of limitations on the repayment obligation of the states.

### II.

Since the duty to repay misused funds is clear, the real issue here is how that obligation may be enforced. The Third Circuit erred in holding that, prior to 1978, the federal government lacked authority to recover misspent Title I grant funds through audit, administrative determination, and demand for restitution.

Since the Title I program began, the Department of Education (or its predecessor agencies) have audited state and local projects and demanded repayment of funds determined to have been misspent. Congress has always been fully aware of these activities and has repeatedly enacted legislation to facilitate the audit-collection process. In 1970 the statute was amended to specify what records grant recipients were required to

keep to facilitate effective audits, and to give the Comptroller General and Commissioner of Education access to those records for the purpose of conducting audits. The legislative history of this provision demonstrates Congressional understanding that the audit process would end in repayment of funds to the federal government if the audits revealed unauthorized expenditures. A 1974 amendment, which placed a five-year statute of limitations on the repayment obligation of grantees, was based upon Congressional acceptance of the existing administrative process.

The 1978 amendments, which explicitly gave the Commissioner of Education authority to demand repayment of misspent funds, were enacted in response to a well-documented decline in audit and recovery activity on the part of the Office of Education. Contrary to the Third Circuit's holding, these statutory changes did not give the Department authority which it did not previously possess; rather, they were designed to establish mandatory standards for the audit process and to authorize judicial review in the Court of Appeals.

## III.

Even if the Department lacked explicit statutory authority, prior to 1978, administratively to demand repayment of misspent funds, it clearly has this authority now. The 1978 statutory amendments should be applied to the audits in the instant case, pursuant to the well-settled rule that a court must apply the law in effect at the time it renders its decision, unless to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

There would be no injustice in applying the 1978 amendments to the instant case. New Jersey and Pennsylvania (like all other participating states) were very much aware (especially in light of the 1970 and 1974 statutory amendments) that the Department historically

was auditing programs and administratively demanding repayment of funds determined to have been misspent. Since the duty to repay misspent funds inheres in the terms on which the grant was made, the 1978 amendments made procedural, not substantive changes.

## IV.

Strong policy justifications exist for requiring repayment of the funds at issue in this case. Unless the Department can impose a penalty for misexpenditures, states and local districts may ignore statutory restrictions which are critical to assuring that categorical funds reach their intended beneficiaries. This is particularly the case in a time of fiscal constraint when local school administrators will be pressured to use federal grants to fill revenue gaps.

The Third Circuit's decision was obviously influenced by a fear that educationally deprived children living in poor areas of Pennsylvania and New Jersey will suffer if repayment is ordered in this case. However, repayment would be the least onerous form of penalty available to the Department in this case. The 1978 amendments to the law permit the Secretary to return up to 75% of funds repaid by state or local education agencies to the states, to be used to provide additional compensatory services to educationally deprived children. Withholding of future grants, on the other hand, would reduce the level of funds otherwise available for remedial programs. Thus administrative repayment vindicates the rights of the statute's intended beneficiaries.

## ARGUMENT

### I. THE DUTY TO MAKE RESTITUTION FOR MISUSED FUNDS INHERES IN THE TERMS UNDER WHICH THE FUNDS WERE GRANTED TO THE STATES

It is undisputed that Title I funds are granted by the federal government to state agencies only for programs which contribute to meeting the needs of educationally deprived children in areas where there are large concentrations of children from low-income families.[4] From its inception, the statute was constructed to make certain that the funds were used only for the intended purposes. Schools, attendance areas and children had to meet very specific statutory criteria to obtain Title I funds and states had to submit assurances that the funds would be administered in accordance with all applicable statutes and regulations.[5] Thus states receiving funds under Title I took them for specific purposes and for no other. When, therefore, the states used such funds for their own, unauthorized purposes, they breached the condition under which the funds were granted. Their position is like that of a trustee who has received money for one purpose and wrongfully converts it to his own use. It is inherent in the condition of trusteeship that funds so converted would be subject to repayment. So here, it is inherent in the restricted terms on which the grant of funds was made that funds converted to unauthorized uses must be repaid.

The states argue, and the court below, without specifically deciding the issue, seems to have accepted, the proposition that, under the "overarching principle" of *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), the states had no obligation to repay misused funds because

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[4] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29.

[5] Pub. L. No. 89-10, § 206, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29, 34.

the duty to repay was not specifically spelled out in the statute until the 1978 amendments. They suggest that the inclusion in the statute of other remedies for misuse, such as the right to withhold future grants,[6] indicates that no other remedy for misuse was intended. Such remedies are not, however, inherent in the conditions of the grant, as is the basic principle that funds converted from their intended purpose must be repaid. The fact that Congress did not find it necessary to spell out this fundamental principle of law cannot be taken as evidencing an intent to render it inapplicable. If a contract of employment specified theft as a reason justifying discharge, this would not give the employee the right to keep the money he had stolen. So here, the fact that Congress specified that future grants could be withheld does not indicate an intent to immunize the states from the basic duty to repay funds which were received for one purpose and diverted to the states' own uses.

This Court's opinion in *Pennhurst State School v. Halderman*, *supra*, does not compel a different conclusion. *Pennhurst* involved a statute which failed adequately to inform states participating in the program which it created of the operating conditions attached to receipt of a grant; the instant matter concerns the sanctions which attend violation of statutory conditions which have at all times been known to participating states.

The fact that Congress in 1978 specially spelled out the duty to repay misused funds does not mean that such duty did not previously exist. As we develop in more detail below, the 1978 amendments were enacted in response to a well-documented decline in audit and recovery activity on the part of the Office of Education. They were designed to establish mandatory standards for the audit process. In such a comprehensive detailing of the procedure for audit and review, it was natural to spell

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[6] Pub. L. No. 89-10, § 210, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29, 36.

out the obligation to pay as well as the procedure for enforcing payment. Caution and redundancy on the part of lawyers and legislators are not uncommon. Reaffirmation of the duty to repay misused funds cannot, therefore, be taken as a sign that Congress previously intended to abrogate the fundamental duty to repay misused funds. To the contrary, as the legislation discussed in Point II of this brief makes clear, Congress always recognized that misspent funds were subject to recovery by the federal government. Indeed, in 1974, Congress enacted a five-year statute of limitations on the right of the federal government to recover misspent funds from the states.[7] (See *infra*, p. 13) It is thus evident that Congress never deemed it necessary to spell out the basic concept that misspent funds should be repaid. That it did so in 1978 in the course of an attempt to strengthen the administrative efforts at enforcement neither adds to nor changes the fundamental duty which already existed. States which obtained money for a specific, limited, purpose are properly held to the knowledge that they must repay funds converted from that purpose to their own use.

## II. SINCE ITS INCEPTION, THE ELEMENTARY AND SECONDARY EDUCATION ACT HAS GIVEN THE FEDERAL GOVERNMENT THE POWER TO CONDUCT AUDITS AND DEMAND REPAYMENT OF FUNDS DETERMINED TO HAVE BEEN MISSPENT

Since the duty of the states to repay misused funds is clear, the only issue in this case is how that duty may be enforced. We agree with the government that, even without statutory authority, the government would have the right to enforce payment by appropriate and reasonable means, including deducting or withholding the amount due from other sums otherwise payable to the recipient.

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[7] Pub. L. No. 93-380 (Education Amendments of 1974), § 106, 88 Stat. 484, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 541, 576.

We rely on the government's argument on that point. Here we deal only with the proposition that from the enactment of the statute, Congress authorized and affirmed the use of administrative methods to determine the extent of misused funds and to enforce repayment thereof.

Since the Title I program began, the Department of Education (or its predecessor agencies) have audited state and local projects and demanded repayment of funds determined to have been misspent. Congress has always been aware of these activities and has enacted legislation to facilitate the audit-collection process.

Section 424 of the General Education Provisions Act,[8] Pub. L. No. 91-230,[9] enacted in 1970, prescribed specific procedures for keeping and retaining records to determine expenditures. It also authorized access by the Secretary and Comptroller General or their duly authorized representative to make "effective audit."[10] The author-

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[8] The General Education Provisions Act (GEPA), 20 U.S.C.S. § 1221 *et seq.*, contains general provisions regarding planning, evaluation, operation and administration of federal education programs. Its provisions are part of ESEA and applicable to Title I.

[9] (Education Amendments of 1970) 84 Stat. 121, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 133, 191.

[10] The statute provides:

*Records and Audit*

Sec. 424. (a) Each recipient of funds from a grant or contract under any applicable program shall keep such records as the Commissioner shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant or contract is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources and such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any

ity of the administrative agency to determine whether there had been misuse of restricted funds was thus clearly established. Congress could not, as the court below suggested, have intended the audit procedure to be merely a way of getting information. If misapplication were found, the agency would be duty bound to take action to remedy the situation. Demand for repayment of misexpenditures is the obvious choice.

That Congress expected the agency to take action to recover misapplied funds uncovered as a result of an audit is confirmed by legislative history accompanying this provision.

S. Rep. No. 91-634, 92d Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 2768, 2827 states:

> Audit reports on Title I of the Elementary and Secondary Education Act have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to be well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer.

This shows that, contrary to the opinion below, Congress did not enact the audit provisions merely to obtain information. It knew that the agency was determining misapplication of funds and enforcing repayment and expected the agency to continue to do so.

Subsequent developments make this even clearer. In 1972, at the suggestion of the grantees, the Secretary, under his rulemaking power, established the Title I Audit

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books, documents, papers, and records of the recipients that are pertinent to the grant or contract received under any applicable program.

Hearing Board (AHB) to review determinations of misapplication found as the result of audits (37 Fed. Reg. 23002-03). In 1974 Congress enacted amendments to ESEA, which contained a five-year statute of limitations on liability for the refund of misspent Title I funds. Pub. L. No. 93-380 (Education Amendments of 1974), § 106, 88 Stat. 484, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 541, 576, provides:

> *Statute of Limitations on Refund of Payments*
>
> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (*including Title I of this Act*) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized. (emphasis added)

The period of limitations was made to run back from the time the state or local agency received "final written notice" that such payment was unauthorized. In explaining what was meant by "final written notice" the House Report reviewed the various steps then existing in the administrative process and stated:

> The Committee intends "final written notice" to be that notice which is given after the State or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on that audit exception.

H.R. Rep. No. 93-805, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4093, 4160.

Congress thus sanctioned the use of administrative proceedings to enforce the duty to repay misspent funds.

In 1978 Congress enacted Section 185,[11] (Pub. L. No. 95-561, 92 Stat. 2143, 2190 (codified as amended at 20

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[11] *Audits and Audit Resolution*

Sec. 185. (a) *Auditing.*—The Inspector General of the Department of Health, Education, and Welfare shall make provision

U.S.C.S. § 2835 (Supp. 1982)) of Title I which directs the Inspector General to conduct audits, and directs the Commissioner to adopt procedures to assure "timely and appropriate" resolution of audit findings. That statute provides that where "under such procedures" the audit resolution requires repayment of misspent funds, the Commissioner "shall require the repayment." It then specifies how repayment may be made.

At the same time it enacted Section 185, Congress amended the General Education Provisions Act (GEPA) to clarify the procedures for audit, including the provision invoked by the states here for judicial review of a final decision by the Court of Appeals.[12]

The Third Circuit held that enactment of Section 185 and other audit provisions in GEPA would not have been necessary if Congress had meant to give this power to the Office of Education (OE) before 1978; that if the

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for audits of grants made under this title to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant.

(b) *Audit Resolution and Repayment.* The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a). Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Commissioner shall require the repayment of the amount of funds under this title which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

[12] 20 U.S.C.S. § 1234d (Supp. 1982).

power to make and enforce administrative determinations previously existed, Congress was, in the 1978 statute, performing a redundant act. It is, however, evident from the face of Section 185 itself that Congress was not creating new rights or even basically new procedures. It was merely directing the strengthening of existing procedures and regulating an already existing administrative process. For example, the power to conduct audits had, as noted above, been given to the Secretary in 1970. Section 185 did not confer new powers; it merely directed that audits be conducted by the Inspector General. Similarly, subsection (b) of Section 185 assumes the existence of an administrative process; it merely directs a speeding up of that process by requiring timetables and by specifying methods of repayment. Particularly when read with the amendments of GEPA relating to the administrative process, Section 185 is properly understood as clarifying an old process, not establishing a new one.

The legislative history of § 185 and the enforcement provisions of GEPA show that Congress enacted these amendments to correct what it regarded as inadequate enforcement by the Office of Education.

H.R. Rep. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4971, 5023-24 states in part:

> The Committee is disturbed by the aforementioned NIE findings concerning the decline in the level of HEW audit activity focused on Title I. The Committee wishes to emphasize that the Inspector General of HEW should insure that Title I programs are audited on a regular basis. . . .
>
> The Committee has in the past expressed its dissatisfaction with the Title I audit resolution process. Adequate improvement has not been forthcoming. The Committee directs the Commissioner to promulgate regulations describing each step of the audit resolution process and deadlines for its completion.

> The Committee expects that such regulation will reflect the relationships among the various OE responsible offices and the Office of the Inspector General. The Committee notes that the HEW Sanction Study states that ". . . as of this writing it may be said that coordination among the various responsible OE offices (BESE, Audit Liaison and Coordination Office, Audit Hearing Board, and Finance Division) is poor. Their roles are not clearly defined and written procedures have yet to be finalized."

The National Institute of Education (NIE) reports referred to by the Committee [13] contained a detailed analysis of the monitoring and enforcement of Title I and concluded that, for various reasons, there had been a marked decline in the monitoring of the use of Title I funds. The Committee, finding the quality of the research by NIE to be excellent, relied on these reports in formulating amendments to Title I. H.R. Rep. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4971, 4975. *See also*, 124 Cong. Rec. 27,317 (1978) (statement of Sen. Pell). The Committee also relied on recommendations for clarifying and simplifying the statute prepared by The Legal Standards Project of the Lawyers' Committee for Civil Rights Under Law, many of which were incorporated into S. 1753 and H.R. 15. (The House bill was passed in lieu of the Senate bill.) [14] All this material indicates that Congress and

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[13] *See* National Institute of Education, ADMINISTRATION OF COMPENSATORY EDUCATION (1977). The NIE prepared six reports pursuant to the Education Amendments of 1974, Pub. Law 93-380. NIE had been directed by Congress to conduct a comprehensive three-year study of Title I.

[14] A comparison of the language in the Lawyers' Committees' recommendations on § 185 and its accompanying legislative history (*see* R. Silverstein, A DESCRIPTION AND ANALYSIS OF H.R. 10891—A BILL REORGANIZING AND AMENDING TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT, 354-57 (1978)) and the language included in Pub. L. 95-561 and H. Rep. No. 95-1137 reveals that the Lawyers' Committees' recommendations on this section were adopted almost verbatim by the Committee.

its consultants did not think of their efforts as creating new rights or new procedures but as clarifying and correcting an existing process.

## III. EVEN IF THE DEPARTMENT OF EDUCATION HAS NOT ALWAYS HAD AUTHORITY TO DEMAND REPAYMENT, ITS PRESENT STATUTORY AUTHORITY TO DO SO SHOULD BE APPLIED TO THE AUDITS IN THE INSTANT CASE

As discussed in Point I of this brief, there can, in our view, be no serious doubt of the basic obligation of states to repay funds which were given to them for a specific purpose but converted by them for their own unauthorized uses. The review of the audits here involved were conducted by the Educational Appeal Board, created by the 1978 amendments as successor to the prior administratively created Board.[15] Review of the audits were initiated by the states in the Court of Appeals pursuant to the 1978 amendments (20 U.S.C.S. § 1234d(Supp. 1982)). Under these circumstances the 1978 statutory amendments should be applied to the audits in the instant case. The 1978 amendments did not create any new obligation on the part of states; at most the 1978 amendments defined an administrative method (with right of judicial review) for enforcing an existing obligation. The change, if it was a change, was procedural, not substantive.

It is an established rule of statutory construction that changes in procedure or remedies, which do not take away substantive rights, are applicable to cases pending at the time of enactment. *See Hallowell v. Commons*, 239 U.S. 506, 508 (1916).[16] Similarly, the general rule is

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[15] 20 U.S.C.S. § 1234 (Supp. 1982).

[16] *See also United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); *Bush v. State Industries, Inc.*, 599 F.2d 780, 786 n.9 (6th Cir. 1979); *United States v. Blue Sea Line*, 553 F.2d 445, 448 (5th Cir. 1977); *Koger v. Ball*, 497 F.2d 702, 706 (4th Cir. 1974); and *see generally Sikora v. American Can Co.*, 622 F.2d 1116, 1119 (3rd

that a court must apply the law in effect at the time it renders its decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981); *Cort v. Ash*, 422 U.S. 66, 77 (1975); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). This rule applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization. *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 282 (1969). Neither rule will, however, be applied when to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Cort v. Ash*, 422 U.S. at 77; *Bradley v. School Bd. of Richmond*, 416 U.S. 711; *United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); *Koger v. Ball*, 497 F.2d 702, 706 (4th Cir. 1974).

It would not be manifestly unjust to apply the 1978 amendments regarding audits to pre-1978 audits. Not only did the obligation to repay misspent funds exist from the time the funds were converted from their intended use, but even the procedures for collection were in general well known to the states before 1978. Audits and recoupment of misspent funds had been taking place since the program began. In 1970 when the statute was amended to include recordkeeping requirements which would facilitate effective audits, the states must have expected some consequences if an audit revealed misapplication of funds. The 1974 statute of limitations, which ran the period back from the final administrative decision, put the states on notice that administrative methods of enforcement were in progress.

As discussed above, the 1978 amendments on their face reveal an intent, reinforced by the legislative history, to

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Cir. 1980); *Mahroom v. Hook*, 563 F.2d 1369, 1373 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); *United States v. Mechem*, 509 F.2d 1193 (10th Cir. 1975); *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974); *Brown v. General Services Admin.*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976); *Montana Power Co. v. Federal Power Comm'n*, 445 F.2d 739, 747 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971).

clarify and strengthen existing procedures. The legislative history of § 451 of GEPA,[17] creating the Education Appeal Board (EAB) indicates that Congress fully expected the new Board to build upon the existing Title I Audit Hearing Board. H. Rep. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4971, 5111. Thus, it is apparent that Congress did not intend the 1978 amendments to have only prospective effect. Rather, the 1978 amendments, including Section 185, were procedural changes, properly applied to pending cases. Indeed the states themselves so recognized when they sought review of the audits in the Court of Appeals pursuant to section 455;[18] hence the procedures of the 1978 amendments, including Section 185, are properly applied here.

## IV. THERE ARE STRONG POLICY REASONS FOR REQUIRING REPAYMENT IN THE INSTANT CASE

The Third Circuit's decision was obviously influenced by its fear that requiring repayment in the instant case would cause educationally deprived children living in poor areas to suffer. In light of the 1978 amendments to GEPA, however (which, as we have shown, are properly applied here), there is no basis for this fear.

Requiring repayment of misspent or misapplied Title I funds is not a penalty, but rather restitution of funds which were improperly used. If restitution is not made, the educationally deprived children who failed to receive the benefits of the misspent funds are the parties who are penalized. Any hardship on States and/or local education agencies (LEAs) can be mitigated, and the equitable rights of educationally deprived children to the benefits of these funds substantially preserved, by use of the 75% payback provision added to ESEA in the 1978 edu-

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[17] 20 U.S.C.S. § 1234 (Supp. 1982).

[18] 20 U.S.C.S. § 1234d (Supp. 1982).

cation amendments (§ 456, 20 U.S.C.S. § 1234e (Supp. 1982)).[19] Pursuant to this section up to 75% of mis-

[19] This section states:

*Use of recovered funds*

(a) Whenever the Commissioner has recovered funds following a final audit determination with respect to any applicable program, he may consider those funds to be additional funds available for that program and may arrange to repay to the State or the local agency affected by that action not to exceed 75 percent of those funds upon his determination that—

(1) the practices or procedures of the State or local agency that resulted in the audit determination have been corrected, and that the State or the local agency is in all other respects in compliance with the requirement of that program;

(2) the State or the local agency has submitted to the Commissioner a plan for the use of those funds pursuant to the requirements of that program and, to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and

(3) the use of those funds in accordance with that plan would serve to achieve the purposes of the program under which the funds were originally granted.

(b) Any payments by the Commissioner under this section, shall be subject to such other conditions as the Commissioner deems necessary to accomplish the purposes of the affected programs, including—

(1) the submission of periodic reports on the use of funds provided under this section, and

(2) consultation by the State or local agency with parents or representatives of the population that will benefit from the payments.

(c) Notwithstanding any other provisions of law, the Commissioner may authorize amounts made available under this section to remain available for expenditures, subject to such conditions as he deems appropriate, for up to three fiscal years following the fiscal year in which the audit determination referred to in subsection (a) was made.

(d) At least thirty days prior to entering into an arrangement under this section, the Commissioner shall publish in the Fed-

applied funds may be returned to the state or LEA for approved Title I programs.

Recovered funds must come from non-federal (or unrestricted federal) grants, *see* § 185 (20 U.S.C.S. § 2835), and thus would augment funds otherwise available for Title I purposes. A withholding action, which the states urge as a penalty, would deny Title I children the misapplied funds not only when they are spent but also any or all future payments, rather than just the misspent portion, thereby penalizing them twice. Use of the repayment sanction, on the other hand, would assure that the intended beneficiaries of the Title I program, originally harmed by the misexpenditure, would now benefit by obtaining a large portion of the original misspent amount.

Even without these special considerations, repayment for misspent funds is proper. There must be some penalty for misusing Title I funds to insure that States and localities do not ignore statutory proscriptions. Unless there is an effective penalty for misuse of funds granted for a particular purpose, the temptation to misuse such funds will not be restricted, particularly in times of economic stringency.

Other remedies for noncompliance, such as withholdings,[20] compliance agreements,[21] and cease and desist orders,[22] are effective only if noncompliance is discovered when it first occurs. In a program as large as Title I, under which 14,000 school districts receive funds annu-

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eral Register a notice of his intent to do so and the terms and conditions under which payments will be made. Interested persons shall have an opportunity for at least thirty days to submit comments to the Commissioner regarding the proposed arrangement.

[20] 20 U.S.C.S. § 1234d (Supp. 1982); 20 U.S.C.S. § 2836 (Supp. 1982).

[21] 20 U.S.C.S. § 2836(c) (Supp. 1982).

[22] 20 U.S.C.S. § 1234c (Supp. 1982).

ally, it is impossible to discover all violations at the time they occur. Enforcement through post-expenditure audit findings is therefore essential.

To excuse pre-1978 violations would allow New Jersey, Pennsylvania, and other states with cases still on appeal to avoid the requirements of the law.[23] Such a result would encourage state and local districts to take program requirements less seriously. It would be unfair to states which have not violated program restrictions and states which, having been found in violation, have voluntarily recognized their accountability and paid their debts. The interests of Title I children and the taxpayer will suffer if States are allowed with impunity to spend funds outside of the purview of the program. These interests will be doubly impaired: first, because funds were diverted from those the program was intended to help, and again when these funds are not recovered. The rights of the program beneficiaries can be vindicated by repayment of the misspent funds. With the 75% payback provision, most of this money can then be directed to those for which it was originally intended—educationally deprived children.

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[23] If the Third Circuit's opinion is affirmed, it is very likely that other federal agencies will be challenged, in their efforts to recoup misspent funds, if there is no explicit statutory authority to demand repayment.

## CONCLUSION

The judgment below should be reversed and the case remanded to the Court of Appeals for determination of the issues remaining in the case.

Respectfully submitted,

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